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### FEATURE COMMENT: Satisfying Rule 9(b) In Pleading A False Claims Act Complaint: Sixth Circuit Gives New Guidance

*U.S. ex rel. Bledsoe v. Community Health Sys., Inc.*, 2007 WL 2492439 (6th Cir. Sept. 6, 2007)

Federal Rule of Civil Procedure 9(b) has become the latest battleground in False Claims Act litigation. Defendant contractors have long filed motions at the outset of FCA lawsuits arguing that the qui tam plaintiff's complaint fails to satisfy Rule 9(b)'s requirement that fraud be pleaded "with particularity." Such motions to dismiss on Rule 9(b) grounds tended to meet with only intermittent success. However, more recently, courts have increasingly seized on Rule 9(b)'s pleading requirement as a way to dismiss meritless cases before they ever reach the discovery stage. In particular, several appellate decisions have announced that plaintiff's complaint must set out the specifics of the alleged fraud against the U.S.—the "who, what, when, where and how"—before an FCA case can go forward.

The recent decision by the U.S. Court of Appeals for the Sixth Circuit in *U.S. ex rel. Bledsoe v. Community Health Sys., Inc.*, 2007 WL 2492439 (6th Cir. Sept. 6, 2007), is the latest decision addressing what a qui tam plaintiff must plead to satisfy Rule 9(b). In doing so, the appeals court addressed several key questions concerning the requirement to plead fraud with particularity. Because of the Sixth Circuit's extended discussion of these issues, the *Bledsoe* opinion is likely to be influential as other courts around the country struggle with applying Rule 9(b) in the FCA context.

**Background**—In February 1998, relator Sean Bledsoe filed an FCA complaint against Community Health Systems (CHS) and several related defendants. From 1995 to 1999, Bledsoe worked as a respiratory staff therapist at White County Community Hospital (White County), which CHS owned. His initial complaint alleged that defendants knowingly presented, or caused to be presented, false or fraudulent claims in violation of 31 USCA § 3729(a)(1) and that defendants conspired to defraud the Government by submitting false or fraudulent schemes in violation of 31 USCA § 3729(a)(3). The original complaint, however, was extremely thin: Relator's allegations, in virtually their entirety, were that defendants had "engaged in a scheme of defrauding the U.S. Government by miscoding and upcoding items billed to Medicare and Medicaid" and that they had "engaged in other improper and illegal acts causing false claims to be filed with Medicare and Medicaid."

In response to defendants' threats to move to dismiss on Rule 9(b) grounds, relator Bledsoe filed an amended complaint. This first amended complaint changed and dropped several defendants. (In the original complaint, Relator had not named White County but instead had charged as a defendant an entirely different hospital with no connection to CHS.) The new complaint also contained new allegations of fraud. The first amended complaint alleged that (1) defendants committed various types of fraud in the White County psychiatric unit, (2) defendants billed Medicare and Medicaid for professional fees using the provider number of a physician who had not provided the medical services, (3) White County billed Medicare and Medicaid for continuous telemetry monitoring that did not meet the applicable billing criteria, and (4) that defendants engaged in other fraudulent acts, "including but not limited to paying providers bonuses based on admissions . . . unbundling of services . . . and similar practices." None of the allegations in this amended complaint, except the accusations of fraud in the psychiatric unit, contained any names of the CHS employees

perpetrating the fraud, nor did the amended complaint provide the dates of the scheme or identify the false claims submitted to the Government.

Defendant CHS moved to dismiss the first amended complaint. The district court granted the motion, dismissing the allegations of fraud in the psychiatric unit—the major allegation in this first amended complaint—on public disclosure grounds since these charges had been fully revealed in a state court lawsuit filed by a White County psychiatrist long before Bledsoe's complaint. The district judge threw out the remaining allegations on Rule 9(b) grounds, finding the first amended complaint deficient because it did not plead fraud with particularity. On appeal, the Sixth Circuit affirmed both rulings. See *U.S. ex rel. Bledsoe v. Community Health Sys.*, 342 F.3d 634 (6th Cir. 2003) (Bledsoe I).

The appeals court in *Bledsoe I* rejected relator's arguments that Rule 9(b) should not apply to the FCA. Relator contended that the FCA was not a fraud statute because its knowledge standard imposes liability for defendants who act with "reckless disregard" rather than an intent to defraud and that Congress did not intend allegations under the FCA to be subject to Rule 9(b). The *Bledsoe I* court disagreed, finding the FCA to be an anti-fraud statute, based on its structure, language and penalties. The Sixth Circuit noted that in holding that FCA complaints must satisfy Rule 9(b), it was joining many other circuits and district courts that had unanimously found the requirements of Rule 9(b) to apply to FCA actions.

The *Bledsoe I* opinion also provided some general guidance for FCA plaintiffs concerning the nature of the requirements of Rule 9(b):

In complying with Rule 9(b), a plaintiff, at a minimum, must allege the time, place and content of the alleged misrepresentation on which he or she relied; the fraudulent scheme; the fraudulent intent of the defendants; and the injury resulting from the fraud. Essentially, the amended complaint should provide fair notice to Defendants and enable them to prepare an informed pleading responsive to the specific allegations of fraud.

342 F.3d at 643 (internal quotation marks and citations omitted).

The *Bledsoe I* court concluded that the first amended complaint was insufficient under Rule 9(b) because it failed to set forth the dates of various FCA violations, the particulars of the incidents of improper

billing, or, with one exception, the names of the individuals involved in the improper billing. However, finding that the issue of whether FCA allegations must comply with Rule 9(b) was unsettled when relator had filed his prior complaints, the appeals court ruled that relator Bledsoe should be permitted another opportunity to attempt to satisfy the particularity requirements of Rule 9(b).

**Bledsoe II**—In May 2004, Bledsoe filed his second amended complaint, which included slightly expanded versions of some of his prior allegations, such as the billing using the wrong provider numbers and billing for continuous telemetry monitoring that supposedly did not occur. In addition, the second amended complaint set forth a host of new allegations of fraud, including (a) billing Medicare and Medicaid for various items that cannot lawfully be separately billed, such as syringes, linens, ice bags or heating pads; (b) improperly billing for "universal setup charge" and vital sign monitors; (c) miscoding and unbundling certain respiratory services; (d) miscoding and mischarging for certain diagnostic related group codes, such as pneumonia DRG code 79 rather than DRG code 89; (e) improperly billing for laboratory tests; and (f) submitting inflated cost reports. Once again, defendants moved to dismiss these allegations, arguing that the allegations were still not sufficiently specific and that they were barred by the statute of limitations. The district court again agreed with defendants' Rule 9(b) arguments as to many of Bledsoe's allegations, concluding that they should be dismissed for lack of particularity. The district court also found the rest of the allegations in the second amended complaint were barred under the FCA's statute of limitations, a decision later reversed by the Sixth Circuit.

In *U.S. ex rel. Bledsoe v. Community Health Systems*, 2007 WL 2492439 (6th Cir. Sept. 6, 2007) (Bledsoe II), the Sixth Circuit had to give flesh to the bare bones language concerning Rule 9(b) that it had announced in *Bledsoe I*. The general statement of what was required in this early opinion was open to various interpretations. Bledsoe had amended his complaint to add more facts and many more claims of fraud, and he now asserted that he met Rule 9(b)'s particularity requirement. Faced with this real-world complaint, the Sixth Circuit in *Bledsoe II* gave concrete and practical answers on some key questions concerning how Rule 9(b) should apply in the FCA context.

The first major Rule 9(b) issue that *Bledsoe II* addressed was whether a defendant must allege the

specific false claims submitted to the Government. Bledsoe argued that he need only plead a false scheme with particularity and that it is unnecessary that the complaint identify specific false claims. The Sixth Circuit disagreed, holding that pleading the specific false claims with particularity is essential under the FCA and the case law interpreting it: “We hold that pleading an actual false claim with particularity is an indispensable element of a complaint that alleges a FCA violation in compliance with Rule 9(b).” The court noted that the requirement stated in *Bledsoe I* that the plaintiff “at a minimum . . . allege the time, place and content of the alleged misrepresentation” could only be understood as applying to the false claims themselves. The *Bledsoe II* court considered the fraudulent claim to be “the *sine qua non* of a False Claims Act violation.” *Id.* (quoting *Sanderson v. HCA—The Healthcare Co.*, 447 F.3d 873, 878 (6th Cir. 2006)). While noting “some support in the case law” for the opposing view, the Sixth Circuit expressly joined the Eleventh and First circuits in adopting a strict requirement that an FCA complaint must identify the specific false claims that were submitted to the Government. See *U.S. ex rel. Clausen v. Lab. Corp. of Am., Inc.*, 290 F.3d 1301 (11th Cir. 2001); *U.S. ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 235 (1st Cir. 2004) (“[Relator’s] failure to identify with particularity any actual false claims that the defendants submitted to the government is, ultimately, fatal to his complaint”).

The *Bledsoe II* decision, however, did leave a narrow opening for plaintiffs seeking to escape the requirement that specific false claims be pleaded to satisfy Rule 9(b). In a footnote, the opinion conceded that in some special situations a relator’s failure to plead the specific false claims might be excused: “We do not intend to foreclose the possibility of a court relaxing this rule in circumstances where a relator demonstrates that he cannot allege the specifics of actual false claims that in all likelihood exist, and the reason that the relator cannot produce such allegations is not attributable to the conduct of the relator.” The court gave the example of a relator who worked in the hospital billing department, had firsthand knowledge of the false claims being submitted, described the alleged fraud in great detail, identified specific confidential documents containing the evidence of the false claims and alleged that the documents were in the exclusive control of the defendants. Nevertheless, *Bledsoe II* noted that the case before it did not present

such circumstances, so it expressed “no opinion as to the contours or existence of any such exception to the general rule that an allegation of an actual false claim is a necessary element of a FCA violation.”

The second major question addressed by *Bledsoe II* was whether, in addition to alleging specific false claims, the plaintiff must plead the identity of the specific individual employees within a defendant corporation who participated in submitting false claims to the Government. On this question, the Sixth Circuit sided with the relator and found no such pleading requirement. The court did not believe that identifying specific employees rose to the level of being an indispensable part of an FCA complaint in the same way as identifying specific false claims. It did not find in the language of the FCA or Rule 9(b) a requirement that the individual corporate employees be named. The *Bledsoe II* court distinguished comments in *Bledsoe I*, *U.S. v. Branhan v. Mercy Health Sys.*, 1999 WL 618018 (6th Cir. Aug. 5, 1999), and numerous cases in other jurisdictions that point to the failure to name specific corporate employees as support for dismissal under Rule 9(b); the appeals court found these decisions to be “unconvincing” or standing only for the “unremarkable” proposition that allegations naming specific employees of a corporate defendant were “relevant” to whether plaintiff had stated the circumstances of fraud with particularity, not whether it was “necessary” to name the specific employees for Rule 9(b) to be satisfied. Consequently, “[w]e therefore hold that while such information is relevant to the inquiry of whether a relator has pled the circumstances constituting fraud with particularity, it is not mandatory.”

The third major Rule 9(b) question addressed by *Bledsoe II* was whether it was proper for the district court to analyze each fraudulent scheme separately. The appeals court began by rejecting Bledsoe’s arguments that if some of the fraudulent schemes are pleaded with particularity, then all of the fraudulent schemes in the complaint should survive Rule 9(b) scrutiny. *Bledsoe II* concluded that a “paragraph-by-paragraph” analysis of a complaint was not only permissible but required if the paragraphs of the relator’s complaint alleged separate and unrelated fraudulent conduct. As the court noted, “There is, quite simply, no legitimate reason for treating insufficient allegations of fraud that are placed in a complaint containing valid allegations differently from insufficient allegations of fraud that occupy their own complaint. Relator does not even attempt to justify such a distinction.”

Seemingly worried about receiving massive complaints identifying vast numbers of false claims, however, the Sixth Circuit noted that there were valid reasons for not requiring a relator to plead every specific instance of fraud if the allegations encompass many allegedly false claims over a substantial period of time. The court expressed concerns about “logistical inefficiency” and “ungainly” complaints if relators were always required to plead every specific false claim. The *Bledsoe II* court thus concluded: “For this reason, we hold that where a relator pleads a complex and far-reaching fraudulent scheme with particularity, and provides examples of specific false claims submitted to the government pursuant to that scheme, a relator may proceed to discovery on the entire fraudulent scheme.”

Having pronounced this rule for “complex and far-reaching” frauds, the appeals court tried to explain what it means and how it would work. It recognized that “the critical question” then becomes how broadly or narrowly a court should construe the concept of fraudulent scheme—how to avoid overly general complaints that give rise to fishing expeditions but still allow plaintiffs to plead using examples. The *Bledsoe II* court struck the balance by providing that “the concept of a false or fraudulent scheme should be construed as narrowly as is necessary to protect the policies promoted by Rule 9(b). Specifically, we hold that the examples that a relator provides will support more generalized allegations of fraud only to the extent that the relator’s examples are *representative samples* of the broader class of claims.” (emphasis in original).

As the court’s own use of emphasis recognized, the meaning of “representative sample” then becomes all important. *Bledsoe II* looked to the Webster dictionary and cited several cases for help defining this term. It concluded that “[t]he examples of false claims pled with specificity should, in all material respects, include general time frame, substantive content, and relation to the allegedly fraudulent scheme, be such that a materially similar set of claims could have been produced with a reasonable probability by a random draw from the total pool of all claims.” According to the court, sample false claims satisfying this test

will be those that allow the defendant to “infer with reasonable accuracy the precise claims at issue by examining the relator’s representative samples.” *Id.*

**Conclusion**—FCA jurisprudence, like the statute itself, has too often been marred by vague standards and ambiguous language that have left practitioners and the courts confused about the correct interpretation. To its credit, the Sixth Circuit in *Bledsoe II* opts for easily applied, bright-line rules. In fact, to ensure that there would be no doubt, the court reiterated its principal conclusions as to Rule 9(b):

To summarize, we hold that a relator bringing an action under the FCA must allege specific false claims with particularity in order to comply with Rule 9(b). However, where the corporation is the defendant in a FCA action, we hold that a relator need not always allege the specific identity of the natural persons within the defendant corporation that submitted the false claims. Instead, such information is merely relevant to the inquiry of whether a relator has pled the circumstances constituting fraud with particularity.

*Id.* at \*10.

The *Bledsoe II* court also attempted to define the scope of a fraud and what constitutes “representative samples” of the class of claims. As indicated by its own extended discussion in attempting to explain these concepts, the appeals court’s decision will not be the last word on when an FCA plaintiff has sufficiently pleaded a representative sample, especially when the relator is claiming a “complex and far-reaching” fraud. While much has been clarified by *Bledsoe II*, much remains to be fought over as courts and parties continue to struggle with Rule 9(b)’s role as the gatekeeper for determining whether FCA complaints should be permitted to go forward.



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